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U.S. Supreme Court, D. C.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1007

WILLIAM H. LANGBOISE, as Executor
of the Will of James McDonald, Jr.,

Petitioner,

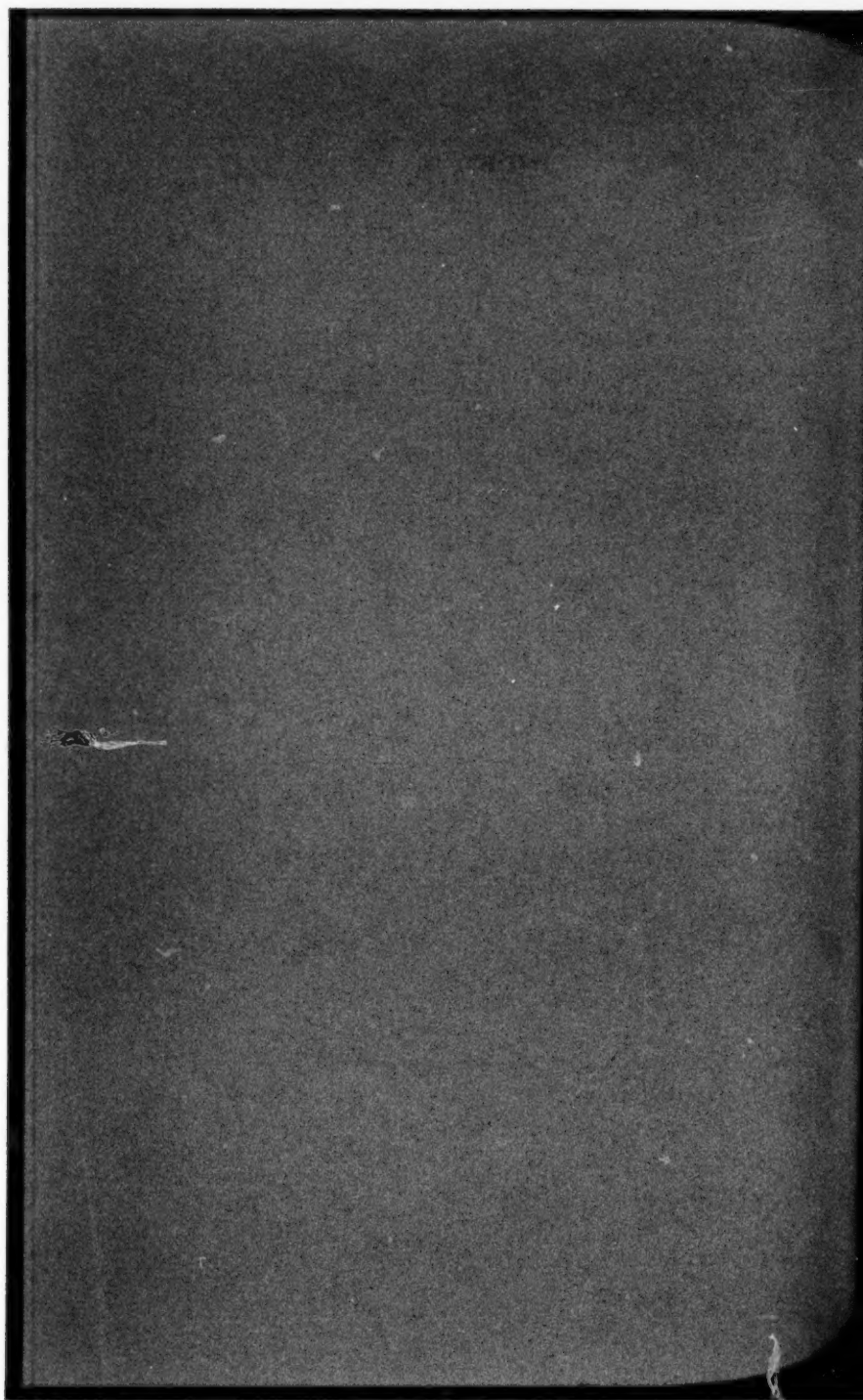
vs.

WILL CUMMINGS, Individually, and
WILL CUMMINGS, as Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Washington, D. C.;
SAM S. GRIFFIN,
WILLIAM H. LANGBOISE,
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No. _____

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vs.

WILL CUMMINGS, Individually, and
WILL CUMMINGS, as Trustee,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable the Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:

William H. Langroise, as Executor of the Will of James McDonald, Jr., by his attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled cause on November 29, 1941.

OPINIONS BELOW

This case was originally tried in the District Court of the United States for the District of Idaho, Southern Division. The opinion of that Court was rendered December 12, 1940, and is reported in 36 Fed. Supp. 174. (T. 150-169.)

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was entered November 29, 1941, and is reported in 123 Fed. (2d) (Adv. Op.) 969.

The petitioner filed a petition for rehearing of the cause with the Circuit Court of Appeals, which petition was denied January 15, 1942.

JURISDICTION

The Supreme Court of the United States has jurisdiction to review the judgment of the Circuit Court of Appeals under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U.S.C.A. 347 (a)).

QUESTIONS PRESENTED

I

Whether under the law of the State of Idaho the statute of limitations is tolled by the death of the debtor.

II

Whether a claim against an estate which need not be presented to the Executor because secured by a lien (I.C.A. Sec. 15-611) is not barred by the running of the statute of limitations.

III

Whether I.C.A. Sec. 5-231 applies only to claims against an estate which need not be and are not filed with the Executor or suits for relief of a special nature not involving money demands.

IV

Whether I.C.A. Sec. 15-608 does not require a copy of a note or instrument on which a claim against an estate is founded to accompany the claim.

V

Whether I.C.A. Secs. 15-604 and 15-605 do not require a creditor of an estate to present a verified claim to the Executor before he may bring suit thereon.

VI

Whether respondent may recover \$11,250.00 as trustee's compensation in spite of a requirement of the contract on which such compensation is based that it shall decrease in the event of a material reduction in income, which in fact occurred.

VII

Whether respondent is entitled to \$10,000.00 as counsel fees in the absence of any evidence of his agreement to pay any attorneys' fees or of the reasonable amount thereof, as required by Idaho law.

VIII

Whether respondent is entitled to recover \$2500.00 for legal services rendered him as trustee, in the absence of any such claim in the claim filed by him with the Executor, and in spite of the fact that respondent's complaint seeks no such recovery.

IX

Whether a trustee may recover from the estate of his donor-beneficiary the expenses and obligations incurred by him in the administration of his trust.

X

Whether a creditor may recover in an action against a decedent's estate sums in excess of the amount of his claim filed against said estate, or for items not included in his claim.

XI

Whether in an action against an estate the plaintiff may amend his complaint after the expiration of the three months' period provided by I.C.A. 15-609 to add items not contained in his original complaint or increase the amount sought to be recovered.

STATEMENT OF FACTS

James McDonald, Senior, died January 20, 1915, leaving a large estate (T. 3, 81). His Will and Codicil thereto creating a trust (T. 103-117) were probated in the District of Columbia (T. 3, 81) and subsequently under such Will the Fulton Trust Company of New York and Joseph S. Graydon (successor trustee) were trustees thereof at the time of death of James McDonald, Junior, (hereinafter referred to as McDonald), petitioner's testator. The trust was terminated as to McDonald by decree of court in the District of Columbia in litigation between petitioner executor and such trustees and others in 1938 (T. 4, 81-82, 12-13, 89, 195, 404-406, Exhibits 13, 14). The trust just referred to will be designated as the "Testamentary Trust" and the trustees as "Testamentary Trustees" to prevent confusion with the trust of Cummings, which will be called the "Cummings Trust", hereinafter referred to.

James McDonald, Junior, whose estate is herein involved, was the son of James McDonald, Senior, above mentioned, and a beneficiary of the testamentary trust. He died July 2, 1936, leaving a will of which petitioner Langroise is executor, and the probate of which was, and is being, had in the Probate Court of Ada County, State of Idaho (T. 2-3, 81, 175).

McDonald borrowed from Will Cummings the sum of \$50,000.00 on December 17, 1931, at which time McDonald executed and delivered to Cummings his three promissory notes, one for \$15,000.00, maturing in one year and subsequently paid (T. 8, 83, 84), one for \$15,000.00 maturing in two years (T. 7, 83, 44, 290, Exhibit 43) and one for \$20,000.00 maturing in three years (T. 47, 83, 290, Exhibit 43). As part of the same transaction, McDonald executed an assignment as security, referred to as Exhibit A to complaint (Exhibit 5 in evidence), he and Cummings executed Exhibit B to complaint (Exhibit 6 in evidence), and he, Cummings and Leo J. Falk executed Exhibit C to complaint (Exhibit 24 in evidence), (T. 6-7, 83-84, 243-245). Subsequently, the first \$15,000.00 note above having been paid, on

September 21, 1933, Cummings loaned McDonald \$16,702.70 and the latter executed and delivered his promissory note therefor, maturing in one year, and also executed Exhibit F to complaint (Exhibit 42 in evidence) which brought such note within the terms of Exhibit A (T. 9-10, 84.85, 49, 57-60, 271-272, 289).

Exhibit A (T. 21) above mentioned is an assignment of all McDonald's interest in his father's estate, including all annuities and income therefrom to Cummings to secure specifically the notes evidencing the \$50,000.00 loan (Exhibit 43) and later the loan of \$16,702.70 (Exhibit 42), appointing Cummings attorney in fact for three years to collect the same, and directing the testamentary trustees to pay it to Cummings. As the testamentary trust was not distributable for some twelve years (1943) the parties contemplated that the annuities and income would be sufficient to pay the notes at maturity, thus discharging the assignment as security and releasing control of his own property back to McDonald, at the end of that period. It was further contemplated, and the testamentary trustee's accounts just previously rendered showed (Exhibits 49, 50, T. 382-383) that there would be an excess of income over the amount required to pay Cummings, who, by Exhibit A had been empowered to collect all of it. (T. 324-382.) Exhibit B (T. 26) was therefore entered into directing disposition of such excess which might be received by Cummings.

By that instrument (Exhibit B) after recital of the notes, of Exhibit A, Cummings, power thereunder to collect, and other indebtedness of McDonald, Cummings became a trustee during the three years of his attorneyship of the trust estate (hereinafter referred to as the "Cummings trust") consisting of:

"the amount received as *surplus* income *over and above* the amount necessary to pay debts secured by assignments" (T. 28).

in other words, the amount of income which Cummings might receive from the testamentary trustees over and above

the amounts required for payment of his own debt secured by the assignment Exhibit A.

This surplus Cummings as trustee was directed to pay in the following order, (1) \$2,000.00 per month to McDonald for support of himself and family, (2) \$1,000.00 per month upon the Littleton judgment, (3) the necessary expenses, including taxes, of the Cummings trust, and (4) the balance pro rata to other scheduled, unsecured creditors of McDonald.

Under Exhibit A Cummings was to appoint an agent in Idaho. Hence, Exhibit C (T. 30-32) was executed. It recites the assignment, Exhibit A, and Cummings powers to collect, Exhibit B, the power of attorney limited to three years, that there are existing creditors in Idaho, that in the previous agreement Cummings is to receive \$5,000.00 per annum as compensation (no such provision appears in Exhibits A or B, unless the expenses payable under Exhibit B is referred to), and therefor Cummings agrees to employ Falk as Idaho assistant in the trust, and agrees to pay Falk \$2,500.00 per annum compensation out of his own pay, and both Falk and Cummings agree:

"In case there should be a material falling off of the income now estimated to be paid by the trustees to said Cummings, as agent aforesaid, all the parties agree that each shall take a corresponding reduction in the allowances to be paid under this agreement * * * * " (T. 31).

Thus, Cummings occupied the capacities of a secured creditor of McDonald, of an attorney in fact of McDonald, exercising complete and absolute control over McDonald's income, and a compensated trustee with definite directions for disposition of the excess thereof after payment of himself.

On February 6, 1932, Cummings, as Trustee, borrowed from W. H. Cheney, Trustee, \$2,342.80 and as trustee executed his note therefor, due ninety days after date, placing the proceeds in his trustee account (Exhibit 35, T. 56-57, 277-278). Cheney himself never presented any claim thereon

against McDonald or his estate after his death (T. 407). Cummings seeks in this action to recover from McDonald's estate the amount thereof with interest (T. 62) and he was given, individually, judgment therefor (T. 143) notwithstanding absence of any agreement by McDonald personally to pay it.

On August 27, 1934, Cummings, as Trustee, borrowed \$5,000.00 from Hamilton National Bank of Chattanooga, Tennessee, executing his trustee note therefor, due in ninety days, and placing the proceeds in his trust account (T. 280-285), Exhibit 38). On September 19, 1935, Cummings, as Trustee, renewed this note (Exhibit 39, T. 312) signing McDonald's name by himself as trustee, but no authority for so signing or renewing appears. On December 19, 1935, he personally purchased it from the Bank (T. 281). However, it, nor a copy of it, did not accompany Cummings' claim presented to the executor (T. 282-285). The Bank presented no claim to the executor (T. 407) and Cummings in this action first sought recovery as owner of the note (T. 63) and thereafter, by amendment, upon the checks with which he purchased it (T. 77). The Bank had not marked the note paid, but endorsed it "Pay to the order of Will Cummings without recourse" (T. 281, Exhibit 39). McDonald had not agreed to be personally liable for this note, nor any other trustee obligations. Cummings, individually, received judgment for the amount of the note with interest (T. 126-129, 144).

Between December 8, 1934, and August 5, 1935, Cummings personally loaned to himself as trustee a total of \$950.00 and between October 21, 1935, and June 1, 1936, the further total sum of \$975.00, which money went into his trust account and was expended therein (T. 64, 130, 275, 356). McDonald never personally agreed or obligated himself to pay these sums, but recovery thereof was permitted with interest from McDonald's estate (T. 52-53, 130, 132).

As trustee, Cummings employed Carl S. Peterson, an accountant, to keep trust books. This was one of the expenses

of the trust payable, under Exhibit B, prior to distribution to other unsecured creditors. There was no agreement by McDonald to be personally liable for such trustee expense. Cummings did not pay Peterson after July 17, 1934, but claimed, and was allowed to recover against the estate, \$587.50 and interest in behalf of Peterson, who had not himself presented any claim to the executor as required by the Probate Law of Idaho (T. 297, 337, 353-355, 359, 362, 408, 135-136).

Shortly prior to November 3, 1934, Cummings as Trustee employed Wilkes Thrasher, an attorney, to investigate whether there existed a "Protestant Widows' and Old Men's Home" in Cincinnati, Ohio, mentioned in the Will of McDonald, Senior. Thrasher presented a bill to Cummings as Trustee, for \$500.00 for services, which he did not pay. McDonald had not agreed personally to pay it, Thrasher did not present any claim to the executor as required by law, nor was there evidence of reasonable value of such service, yet this sum with interest was included in the judgment against petitioner executor (T. 300-303, 328-329, 407-408, 134-5).

Cummings as Trustee claimed an annual salary of \$2,500.00 from December 17, 1931, until July 2, 1936 (four years and six months), a total of \$11,250.00, with interest thereon from the end of each year. The claim was founded upon Exhibit C, which, however, did not accompany the claim against the estate presented to the executor. Cummings as Trustee did not pay such salary. No agreement by McDonald personally to pay such salary appears, but it was payable only out of the Cummings trust property; that is, the excess of income received over debts secured by assignment, received by Cummings from the testamentary trustees (T. 26-32). As above pointed out, by Exhibit C, Cummings was to take a reduction of salary corresponding to a falling off of income received then (December 17, 1931) estimated to be paid him by the testamentary trustees. There was such reduction. While Cummings was evasive in his testimony

concerning such estimate and intimates none was made, yet Exhibit C flatly states such estimate was in fact made, and Cummings, a financial officer of a large Tennessee County, did estimate that he would be repaid \$50,000.00 with interest in three years (Exhibit A), and that there would be a surplus of income received by Cummings sufficient to pay \$2,000.00 per month to McDonald, \$1,000.00 per month to Littleton, trustee's expense including \$5,000.00 per year compensation, with a balance applicable to unsecured scheduled creditors (Exhibit B and C); he had consulted the testamentary trustees in New York, checked to see how much was coming, examined testamentary trustee's reports which showed \$146,573.04 income the previous year (T. 232, 242, 324-327, 328, Exhibit 49, T. 382). Cummings' own reports of receipts from the testamentary trustees shows a year by year reduction and a final ending in July, 1935, a year before McDonald's death (T. 52-53, 55). By years, income received by Cummings was reduced, during Cummings' trusteeship and up to the death of McDonald, the period for which compensation is claimed, as follows:

1931-32	\$41,699.13
1932-33	34,854.63
1933-34	25,083.29
1934-35	12,576.67
1935-36	None

Yet the court made no reduction in its judgment, allowing the full sum of \$2,500.00 per year, or \$11,250.00 together with 6% annual interest on accruing amounts (T. 145-146). Aside from the contract, Exhibit C, there was total absence of evidence of reasonable value of his services (T. 307-8).

After the death of McDonald, Cummings made certain advances to his trustee account totaling \$388.26 and Peterson claimed additional compensation of \$437.50 unpaid by Cummings and stenographic services of \$35.25, unpaid, all totaling \$861.01. These were not pleaded originally but during trial amendment was allowed. None of the items

were ever presented to the executor for allowance or rejection, either by Cummings or Peterson, and neither the executor nor the Probate Court of Ada County, Idaho, ever had opportunity to examine or pass upon them. No showing that McDonald agreed to pay was shown (T. 348-355, Exhibit 56, T. 78-79). The Court, however, entered judgment against the estate for these items (T. 137, 145).

The foregoing items—the Cheney note (Exhibit 35); the Hamilton Bank note (Exhibit 39); \$1,725.00 loaned to Cummings, as Trustee, by Cummings individually, and not paid by the trustee; trustee expense incurred, but not paid by the trustee, to Carl S. Peterson, bookkeeper; trustee expense incurred, but not paid by the trustee, to Thrasher, attorney; trustee expense incurred, but not paid by the trustee, for his own trustee compensation; and trustee expense for loans to himself as trustee, and for employment of Peterson, incurred after the death of McDonald and not paid by the trustee—will be referred to hereafter as the claims of Cummings, as Trustee, or trustee items.

In addition to the trustee items, the action involved certain indebtedness claimed out of loans made by Cummings as an individual directly to McDonald. The notes of December 17, 1931, for \$15,000.00 (Exhibit 43) and of September 21, 1933 (Exhibit 42) for \$16,702.70, secured by Exhibit A (Exhibit 5) and Exhibit F (Exhibit 42) have already been above described.

About August 7, 1935, the testamentary trustees were served with notice and levy under the Internal Revenue Laws of the United States on account of claimed income taxes of McDonald, and thereupon and thereafter such trustees withheld payments of annuities and income to Cummings. Thereafter, beginning September 7, 1935, and ending June 9, 1936, Cummings loaned various sums to a total of \$5,752.00 and \$58.46 to McDonald or his wife, and McDonald in November, 1935, executed Exhibit D (Exhibit 4 in evidence) whereby such advances were secured under Exhibit A, the assignment made December 17, 1931 (T. 65-69, 87, 32-33, Exhibit 4, 203-

204, 207-209, 267-269, 272-274, 346, 365). These and the notes above will herein be referred to as claims or items of Cummings individually.

After the death of McDonald the testamentary trustees took the position that his estate was entitled to none of the assets or income of the trust estate; that under clause "N" of the Will of McDonald, Senior, the trust estate would be ultimately distributable directly to the widow (Lula B. McDonald) and sons of McDonald, Junior, (T. 110, 314-325) so that thus the creditors of McDonald, including Cummings, would get nothing. Subsequently, the testamentary trustees brought action in the United States District Court for the District of Columbia seeking an interpretation of the Will, in which action petitioner executor appeared with the result that such Court decreed in June, 1938, that as to the interest of McDonald, Junior, the testamentary trust was terminated and that his portion of the assets should be delivered to Langroise, the petitioner executor, for the McDonald estate. The assets were finally so delivered in October, 1938 (T. 12-13, 89, 211-213, 404, 405).

J. J. Lynch, an attorney at Chattanooga, Tennessee, prepared a claim for Cummings which Lynch transmitted to the executor within the statutory time limit for presentation, and upon which he instructed the executor not to take action until after conference with him. Accordingly, the executor Langroise withheld action until after several conferences with Lynch and after Cummings instituted action against the executor in the District of Columbia upon the same items (which action the Court there dismissed), November 10, 1939, when the claim was rejected. The present action upon the rejected claim was commenced February 6, 1940, and a copy of the claim is attached to the complaint as Exhibit E thereto (T. 11, 16-17, 34-57, 60, 88-89, 314, 318, 384, 386-404, 406-407, 410). The claim purports to be the personal claim of, and verified by, Cummings. However, it sets up the items claimed by Cummings, as Trustee, by Peterson, Cheney, and Thrasher, none of whom as hereinbefore

stated presented or verified any claim against the McDonald estate. Neither the originals or copies of Exhibits A, B, C, D, and F, accompanied the claim, nor were at any time filed with Langroise as executor, as heretofore stated. In 1935, long prior to McDonald's death and the appointment of Langroise as executor, copies of Exhibits A and B had been sent in connection with a matter not involving Cummings' claim to Langroise, then not executor, but acting only as an attorney. The Circuit Court held, as to such latter exhibits, that this was sufficient compliance with the Idaho statute requiring foundation documents to accompany a claim against an estate (T. 185-191, 251-254, 385), and as to Exhibit C (which is the foundation of the claim of compensation for Cummings, as Trustee) held it sufficiently accompanying Cummings' claim although attached to an entirely different claim by a different individual (T. 255, 385). Exhibit F and 39 (Hamilton Bank note) nor a copy, did not accompany the claim, nor were they shown ever to have been in the hands of Langroise as attorney, executor or otherwise (T. 289, 385). The \$15,000.00 note of December 17, 1931, being part of Exhibit 43, nor a copy thereof, did not accompany the claim (T. 290-294) a note in different terms having been attached thereto (T. 44-47). The Circuit Court held the Cummings claim sufficient notwithstanding the foregoing (T. 138, 146, 163-4).

Three of the notes evidencing individual Cummings items (T. 44-49) aggregating \$51,702.70 of the principal sued for, contained agreements to pay reasonable attorney's fees in case of suit. There was no such agreement with respect to other individual Cummings loans, or trustee items, making up the balance of the accounts sued for. There was no evidence that Cummings agreed to pay attorney's fees, nor any amount agree by him to be paid. Nor was there any evidence of the work required of attorneys in connection with the collection of such notes; on the contrary, the evidence on the point of attorney's labors was with respect to the work involved on all the items sued for, and showed that the major

portion of it was in connection with trustee items, and in connection with the first suit by Cummings against Langroise, executor, brought in a court without jurisdiction and therefore by the Court in the District of Columbia dismissed on motion (Exhibits 15, 16, T. 195-196, 366-374). There was no evidence of what would be reasonable attorney's fees for collection of the notes, nor for the whole case, the estimate being based on a hypothetical question largely reciting labors connected with the Cummings trust and its items, and even then being an estimate not of a "reasonable" fee, but of a fee contingent on a substantial recovery (T. 274-379). However, the Court ignored even this and allowed attorney's fees totalling \$10,000.00, of which \$7,500.00 was largely for services in the case brought by the testamentary trustees against the executor and legatees to determine the interpretation of the Will of McDonald, Senior, to which Cummings was not a party, and in which he testified no attorney represented him (T. 322), and for services in his District of Columbia suit against the executor which was dismissed for lack of jurisdiction; and the balance of \$2,500.00 for attorney's services to Cummings as Trustee, for which McDonald had not obligated himself (T. 165-6, 141-2, 146).

The time limit fixed by the Idaho general statutes of limitations (I.C.A. Secs. 5-214, 5-216, 5-217 and 5-228; note: this reference herein and hereafter is to Idaho Code Annotated, 1932, Official Edition) had expired at the time this action was commenced as to all sums sought to be recovered by respondent, with interest thereon, excepting the principal sum of \$4,962.50.

These amounts as to which the time fixed by the statute of limitation had expired are:

Three notes given by McDonald to Cummings	\$51,702.70
Loans by Cummings, individually, to McDonald	
ald.....	2,560.46
Cheney note	2,342.80
Hamilton Bank note.....	5,000.00
Loans by Cummings to Cummings, Trustee....	1,375.00

Thrasher's fee	500.00
Peterson's salary	587.50
Cummings' compensation as trustee.....	10,000.00
Attorney's fee based on notes.....	10,000.00
	<hr/>
	\$84,068.46

The opinion of the District Court appears at T. 150-169 (36 Fed. Supp. 174). The Court was of the opinion that the agreements required no priority of payment either of the original \$50,000.00 loan by Cummings to McDonald, or of other items of Exhibit B, over pro rating of balance of income, after these were paid, to unsecured creditors (T. 153), that no items were barred by statute of limitations, the provisions of the Idaho Probate Statutes superseding such limitations, and that the time from death to rejection of a claim is not to be computed or taken into account. Further, the Court held that the claims of Cummings as an individual, without accompanying the same with foundation documents as required by law, was sufficient (T. 163-4), and that items incurred by a trustee (Cummings) are chargeable against the creator-beneficiary, personally, without agreement of the latter to pay the same (T. 165). The opinion on attorney's fees has already been epitomized (T. 165-6). The Court further was of the opinion that Cummings individually could include in his claim presented in the estate the claims of Cummings, Trustee, Cheney, Peterson and Thrasher, and could personally recover judgment therefor, without his having paid them and without respect to Idaho laws, and under Rule 8 of Federal Rules of Court Procedure (T. 167).

Following such opinion the District Court made Findings and Conclusions (T. 118-149), and entered judgment on January 4, 1941, in favor of Cummings personally for all items, including individual, trustee, Cheney, Thrasher and Peterson claims, and for \$10,000.00 attorney's fees, the whole amounting to \$125,491.98, of which \$107,901.95 was decreed a lien on all testamentary trustee assets received by the estate, all of which were directed to be turned over to the

Clerk of the Court for foreclosure; the balance of \$17,590.03 was ordered paid in course of administration and costs of \$158.00 were allowed respondent Cummings. Will Cummings, as trustee, plaintiff, was ignored (T. 169-173). This judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit on November 29, 1941 (123 Fed. (2d) Adv. Op. 969).

SPECIFICATIONS OF ERROR TO BE URGED

I

The court erred in holding that recovery of the sum of \$84,068.46 of the principal sum sued for, including attorney's fee, is not barred by the statute of limitations, contrary to the law of the State of Idaho.

II

The court erred in holding that the statute of limitations is tolled by the death of the debtor, contrary to the law of the State of Idaho.

III

The court erred in failing to hold that the statute of limitations did not bar recovery of all items secured by a lien on the trust assets, and in failing to apply the provisions of L.C.A. Sec. 15-611 in substance that no claim secured by a lien need be filed with an executor prior to suit to foreclose.

IV

The court erred in holding that L.C.A. Sec. 5-231, contrary to its language and the decisions of the Idaho Supreme Court, applies only to claims which need not be and are not filed with the executor or to suits for relief of a special nature not involving money demands.

V

The court erred in failing to hold that L.C.A. Sec. 15-608 requires a copy of a note or instrument on which a claim against an estate is founded to accompany the claim, contrary to the express provisions of said Idaho statute.

VI

The court erred in holding that it was not necessary for certain creditors of an estate, to-wit, Cummings, as trustee, Thrasher, Cheney, Hamilton National Bank, and Peterson, to file claims against the estate with the executor, as specifically required by Idaho law.

VII

The court erred in permitting respondent to recover \$11,250.00 as compensation for his services as Trustee, contrary to the specific terms of the contract, to the rule against recovery by a trustee of trust expense from a donor-beneficiary, to the Idaho statute of limitations, and to Idaho law requiring presentation of claims.

VIII

The court erred in holding that there is competent evidence that McDonald personally agreed to pay the compensation to the trustee.

IX

The court erred in permitting respondent to recover an allowance of \$10,000.00 for counsel fees in the absence of any evidence that respondent agreed to pay any attorneys' fees, and of any evidence of the amount of attorneys' fees which is reasonable, contrary to the requirements of Idaho law.

X

The court erred in holding that respondent may recover \$2,500.00 as attorneys' fees for legal services rendered Cummings, as Trustee, notwithstanding that the claim filed by Cummings with the executor made no claim for any such obligation, as required by Idaho probate law, and notwithstanding the complaint filed by respondent in this action neither alleged such indebtedness nor sought such recovery.

XI

The court erred in holding that a trustee (respondent) may have direct recourse against the estate of the donor.

beneficiary (petitioner) for expenses and obligations of the trust.

XII

The court erred in holding that Cummings, individually, was entitled to recover trustee expenses after the death of McDonald when the same were not included in his claim filed with the executor.

XIII

The court erred in holding that Cummings, individually, could recover as Peterson's salary \$150.00 more than the amount of such item, as set forth in his claim filed with the executor.

XIV

The court erred in permitting respondent to amend his complaint during trial and after the three months' period allowed by I.C.A. 15-609 had expired to increase the amount sought to be recovered and to add items not contained in the original complaint.

XV

The court erred in entering judgment for respondent in excess of the sum of \$3,250.00.

REASONS FOR GRANTING THE WRIT

The decision below involves the determination of a number of questions of the law of the State of Idaho, and petitioner submits that the adjudication on these questions is probably in conflict with the statutes of Idaho and the applicable decisions of the Supreme Court of the State of Idaho.

In deciding these questions of local law the Federal courts are bound by the statutes and decisions of the State of Idaho.

Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, (1938).

Huron Holding Co. v. Lincoln M. Operating Co., 312 U. S. 183, 61 Sup. Ct. 513, 85 L. ed. 725, (1941).

Moore v. Ill. Cent. R. Co., 312 U. S. 630, 61 Sup. Ct. 754, 85 L. ed. 1089, (1941).

Yet the Court below ignored the Idaho law and rendered a decision which not only very seriously affects petitioner adversely because of the large amount involved, but also creates a chaotic condition in several extremely important branches of the trust and probate laws of this State.

Because of the numerous questions involved it is thought desirable to arrange them under separate headings and thereunder to indicate briefly to this Court the reasons why the decision of the Circuit Court is erroneous.

The Statute of Limitations Bars Recovery of the Total Amount Sued for With Interest Thereon Except the Principal Sum of \$4,962.50

It is conceded that the time limit provided by the Idaho statutes of limitations (I.C.A. 5-214, 5-216, 5-217, 5-228; the Idaho statutes are set out in the appendix) had expired as to the principal amount for which recovery is sought of \$84,068.46.

The court below is required to follow and apply the Idaho statutes of limitations.

Moore v. Ill. Cent. R. Co., *supra*.

In Idaho the statutes of limitations apply in a case in equity as well as one at law.

Steinour v. Oakley State Bank, 49 Ida. 293, 287 Pac. 949, (1930).

However, the Circuit Court permitted recovery of the full amount sued for, together with interest thereon.

The statute of limitations had not run as to any of these items at the time of the death of the debtor McDonald, and the court held that in Idaho the death of the debtor tolls the running of the statute. The rationale of the court is that the Idaho probate statutes of non-claim (I.C.A. 15-601, 15-602, 15-604, 15-607, 15-609 and 15-611) provide a scheme different

from and independent of the general statutes of limitations, and, thus, are a "different limitation" within the meaning of I.C.A. 5-201, which excepts the statutes of limitations "when in special cases a different limitation is prescribed by statute".

This decision of the courts results from a tortured construction of Idaho statutes and a disregard of Idaho decisions. The statute of limitations merely bars the remedy while the statutes of non-claim operate directly to wipe out the debt. They operate independently of each other and one does not supersede or supplant the other; consequently, the statute of limitations continues to run after the death of the debtor (except by statute in special instances not concerned here), and if the time expires before suit is commenced recovery cannot be had. It must be kept in mind that petitioner is sued as the executor of a decedent's estate and he may not waive the bar of the statute.

Dern v. Olsen, 18 Ida. 358, 110 Pac. 164, (1910).

In *Gwinn v. Melvin*, 9 Ida. 202, 72 Pac. 961, (1903), the Supreme Court held that the statute of limitations is applicable to a creditor of a decedent and he must act to save his claim from the bar of the statute.

Later the Court said in *Dern v. Olsen*, *supra*, that where a note matures prior to death the general statute of limitations expiring during administration of the estate bars the action. The Court said:

"It was the intention of the lawmakers to prohibit the administrator in any manner extending the bar of the statute of limitations or to interrupt its running against the debtor or claim against the estate he represents."

Again, in *Miller v. Lewiston Nat. Bank*, 18 Ida. 124, 108 Pac. 901, (1910), the court reiterates its established rule that the general statute of limitations continues to run after death.

The Circuit Court, in reaching its determination that the running of the statute of limitations ceases upon the death of the debtor, wholly disregards these Idaho decisions, except to mention that they did not stop to analyze the case of *Miller v. Lewiston Nat. Bank*, *supra*.

The Idaho statutes of limitations themselves are generally in their scope and contain no intimation that they cease to operate upon the death of the debtor. In addition, there are two provisions of the Idaho Probate Code which force the conclusion that the statute continues to run.

I.C.A. 5-231 provides that if a person against whom an action may be brought die before the statute of limitations has run and the action survives, the action may be commenced after the expiration of the period of the statute and within one year after issuance of letters testamentary. Thus, the legislature has provided for extending the period of the general statute of limitations in a certain specified instance; and the conclusion follows inescapably that the statute of limitations continues to run after death except when so extended by this statute. (This statute does not extend the period of limitations in this case as this action was not commenced within a year after issuance of letters testamentary to Langroise.)

The Idaho Supreme Court considered I.C.A. 5-231 in *Miller v. Lewiston Nat. Bank*, *supra*, and said:

"It is apparent that the provisions of this section were not intended to shorten the time within which an action may be brought, under the general provisions of the statute, but were intended to extend such time in certain cases; that is, where at the time of a party's death there is not one year left of the period of limitations prescribed by the general statutes after the issuing of letters, the claimant shall have at least one year therefrom, and thus to this extent this section extends rather than shortens the period. If, however, at the time of issuing letters more than one year is left of the period of limitations prescribed by the general statute, then

this statute does not shorten that period, *and in such case it has no effect whatever.*" (Italics ours.)

Thus, it is clear that the state court considers the general statute of limitations keeps running after death and bars an action, unless extended by I.C.A. 5-231.

The Circuit Court admitted that this statute conflicted with its position that death tolls the running of the statute of limitations, and consequently stated that it only applies to "claims which need not be and are not filed with the executor or to suits for relief of a special nature, not involving money demands". No such strained limitation can be supported by the language of the act itself. It is general in its terms, applies to all actions which survive, and contains no words of limitation or exclusion. It is apparent on its face that the legislature knew the general statute of limitations continued to run after death, and that the act was necessary to protect creditors whose claims would be barred within a short time after death. Unless such construction is given the statute it is meaningless and the purpose of the legislature is futile.

California has an identical statute in Sec. 353 of the Code of Civil Procedure, and the California courts have held that it applies to money demands which must be presented to the executor.

Barclay v. Blackinton, 127 Cal. 189, 59 Pac. 834, (1899).

In Re Garnett's Estate, 126 Cal. App. 344, 14 Pac. (2d) 572, (1932).

Dodson v. Greuner, 28 Cal. App. (2d) 418, 82 Pac. (2d), (1938).

The strained construction imposed on this statute by the court below is unwarranted. If it is granted its obvious scope it harmonizes with the Idaho Probate Code and with the established Idaho doctrine that the statute of limitations continues to run after death.

The same conclusion is inexorably demanded by I.C.A. 15-738, which provides:

"* * * No claim against any estate which has been presented and allowed is affected by the statute of limitations pending the proceedings for settlement of the estate. * * *"

So, if a claim is presented and allowed the statute of limitations ceases to run against it, and, applying the familiar rule of statutory construction of *expressio unius est exclusio alterius*, the general statute of limitations continues to run against all claims not so presented and allowed. This doctrine is Idaho law.

People v. Goldman, 1 Ida. 714, 23 Pac. St. Rep. 714, (1878).

Peck v. State, Ida., 120 Pac. (2d) Adv. Op. 820, (1941).

The Circuit Court bases its conclusion that the probate statutes of non-claim provide a different limitation within the meaning of I.C.A. 5-201 or a "statutory prohibition" within the terms of I.C.A. 5-234, and thus death stops the running of the statute of limitations, upon *Wormward v. Brown*, 50 Ida. 125, 294 Pac. 331, (1930). This case is not in point; it neither discusses nor is concerned with the statute of limitations; it does not attempt to construe the Idaho statutes. It certainly does not hold that death tolls the statute, nor overrule the above cited Idaho cases. At the very most this case states that rejection of a claim by the executor is a condition precedent to suit; and the claimant may readily compel the executor to act. Thus, this case is not a "statutory prohibition" as required by I.C.A. 5-234.

The court below held that respondent has a lien to secure the bulk of his claim. Therefore, by I.C.A. 15-611 it was unnecessary for him to present a claim to the executor. This would bring all the lien items squarely within the Circuit Court's own construction of I.C.A. 5-231, as being a claim which need not be filed with the executor. Thus, by that

Court's very declaration these secured claims are outside of the statutory scheme of the statutes of non-claim which supercede the general statutes of limitations. Therefore, the statute of limitations continued to run as to such items and they were barred at the time this action was commenced.

The Circuit Court, in holding that the statute of limitations ceases to run upon the death of the debtor, has disregarded the contrary local law of the State of Idaho. If this opinion should stand the unfortunate condition is created whereby a creditor of an estate who is able to bring his action in the Federal courts is not affected by the statute of limitations, but the local creditors who have access only to the State courts are barred from recovery if the period of limitation has expired.

The Court Erred in Failing to Apply I.C.C. 15-608, and Require That the Claims Founded Upon Written Instruments Be Accompanied by Copies Thereof

I.C.A. 15-608 provides:

"If the claim is founded on a bond, bill, note or any other instrument, a copy of such instrument must accompany the claim. * *"

It is admitted that copies of the three agreements entered into in 1931, being Exhibits, attached to the complaint, A, on which respondent bases his right to a lien, B his right to trustee items, and C his right to trustee compensation, were not attached to the claim, nor were they ever presented to nor filed with the executor.

The court below felt, however, that the statute had been substantially complied with because Mr. Langroise had, during the lifetime of McDonald, come into possession of copies of Exhibits A and B as his attorney, and because a copy of Exhibit C was attached to another claim filed by a wholly different person.

The purpose of this statutory requirement is to enable the Executor and the Probate Judge intelligently to pass upon

the claims presented. The Circuit Court so held in its opinion in this case. But here, even if the Executor had access to copies in his attorney's files, the Probate Judge was denied the statutory right to examine these instruments in passing on the claim.

This provision of the statute is mandatory.

Flynn v. Driscoll, 38 Ida. 545, 223 Pac. 528, (1924).

and, therefore, the Court wholly disregarded the Idaho statutes and decisions by holding a claim is properly filed which is not accompanied by copies of instruments on which it is founded.

It Was Erroneous for the Court to Disregard the Mandate of the Idaho Statutes Requiring a Creditor to File a Claim Against the Estate

Cheney, Peterson, Thrasher and Cummings, Trustee, did not file any claim with the Executor of McDonald's estate. Nor was any claim filed for the amount based on the Hamilton Bank note. Cummings included the amounts, due these persons from the Cummings trust only, in his individual claim.

I.C.A. 15-604 provides that any claim not presented within six months is barred, and I.C.A. 15-605 requires every claim to be verified by the claimant or someone in his behalf. It is not contended that these persons filed any claim, nor that any claim was verified by them or someone in their behalf. Consequently, no recovery can be had for these items.

Schneeberger v. Fraser, 36 Ida. 737, 213 Pac. 568, (1923).

The Circuit Court thought that, as these persons were looking primarily to the Cummings trust estate for reimbursement, Cummings could include all their items in his individual claim against McDonald's estate. However, petitioner is at a loss to understand why this would enable the court to sanction failure to comply with the mandatory requirements of Idaho law.

In the claim filed by Cummings, individually, with the Executor he sought payment to him of \$437.00 allegedly due Peterson as salary. But in bringing this action he seeks to recover \$587.50 for such salary, or \$150.00 more than the amount for which the claim was filed. The court, disregarding the requirements of the above mentioned Idaho statutes which do not permit recovery for more than the amount for which the claim was filed, allowed respondent to recover the additional sum of \$150.00 without giving any explanation in its opinion for refusing to follow the Idaho law. The same thing is true with regard to the sum of \$861.01, being trustee expense after the death of McDonald. No claim for this sum was filed with the Executor; nor did respondent seek it in his original complaint. However, during trial, and after the three months' period allowed by I.C.A. 15-609 had expired, amendment was permitted over objection to include this amount.

It Was Erroneous for the Court to Allow Recovery of \$11,250.00 as Trustee's Compensation

Respondent seeks to recover compensation for his services as trustee at the rate of \$2,500.00 a year with interest as each accrued. This was allowed in full.

This claim is based on Exhibit C, which states as follows:

"In case there should be a material falling off of the income now estimated to be paid by the trustees to said Cummings, as agent as aforesaid, all the parties agree that each shall take a corresponding reduction in the allowances to be paid under this agreement and the agreements herein referred to."

The reports of the testamentary trustees, Exhibits 49 and 50 (T. 350-384), for the year prior to December, 1931, when Exhibit C was executed, showed an income payable to Cummings had the agreements then been in effect of more than \$130,000.00 per year.

Cummings' trust report of income paid to him, Exhibit 28,

page 2, (T. 52-53) shows a constant material reduction. Based on the above estimate and upon such income paid the reduction of salary as agreed to in Exhibit C is easily computable, i. e.:

Estimate of \$130,000.00 Per Year

Salary If No Reduction of Income \$2,500.00

Income Received	Like-Proportion of Salary Payable
1932—\$41,699.13	\$ 825.00
1933— 34,854.63	673.00
1934— 25,083.29	410.00
1935— 12,576.67 to and inc. August	242.00
1936— Nothing after August, 1935....	0.00
Total allowable salary.....	\$2,150.00

It is clear from Exhibits A, B and C that the parties anticipated an income of not less than \$60,000.00 a year for otherwise the disbursements therein required to be made could not have been paid. Also Cummings received the first year \$41,699.13. Although this is far less than what was obviously estimated to be the annual income, using \$42,000.00 as the basis the salary would be as follows:

1932—	\$41,699.13	\$2,500.00
1933—	34,854.63	2,084.00
1934—	25,083.29	1,488.00
1935 to Aug.	12,576.67	750.00
1936—Nothing		0.00
Total allowable salary.....		\$6,822.00

The court below chose to take no notice of this agreement of the parties and allowed respondent the full sum of \$11,250.00, together with interest thereon of \$4,237.50, making a total of \$15,487.50.

The court attempts to justify its action by saying that the claim of Leo J. Falk, Cummings' agent in Idaho, who was to receive the same compensation as Cummings under

Exhibit C, for \$11,250.00 was allowed in full. This is incorrect. Exhibit 19, a copy of Falk's claim, shows on its face that it was only partially allowed by the Executor and Probate Judge for the sum of \$8,426.00, including all interest thereon. This contrasts with the allowance by the court to respondent for \$15,487.50.

The Circuit Court also mentions that there is competent evidence that McDonald had personally agreed to pay this compensation. However, a close scrutiny of all the evidence discloses that Exhibit C is the only evidence concerning this salary. There is no evidence that McDonald agreed to pay it personally, or from which such an agreement can be inferred.

This obvious error should be corrected by this court, and respondent should be limited by the agreement which he made.

It Was Error for the Court to Allow Recovery for the Trustee Items Against McDonald's Estate

By the instrument Exhibit B to the complaint McDonald designated Cummings as trustee and established the trust estate which he was to administer. This estate consisted solely of "the amount *received* as surplus income over and above the amount necessary to pay debts secured by assignments". As such trustee Cummings incurred certain obligations which became and were liabilities of his trust estate. These items are the Cheney note, Hamilton Bank note, loans by Cummings individually to the trust, Peterson's salary, Thrasher's attorney's fee, Cummings' compensation as trustee, and trustees' expenses after McDonald's death.

The Circuit Court permitted individually to recover all of these trustee items from the estate of McDonald, the donor-beneficiary of the trust. Thus, the court establishes as a rule of law that a trustee may borrow money, incur obligations and create trust expenses, and then if such liabilities are in excess of his trust estate he may recover them from the donor of the trust or the beneficiary of the

trust personally. Petitioner submits that this ruling is contrary to the universally established doctrine that a trustee must look solely to the trust estate for reimbursement of his proper and necessary expenditures, that that is his sole recourse for trustee obligations, and that he cannot hold a donor or a beneficiary of a trust personally liable.

The court intimated in its opinion that its reason for ignoring this doctrine was that McDonald was in some way benefited. This reason is unsound because a beneficiary of a trust always benefits from a proper administration thereof by the trustee. If an indirect benefit to a beneficiary is reason for holding him personally liable for trustee obligations, then the contrary rule of no such liability would never have been established nor applied.

The court below also stated that it believed the executor had received \$34,166.20, which might have gone to Cummings, trustee, and used to pay such trustee obligations. However, an examination of Exhibit B, the trust instrument, discloses that these monies received by the executor were not trust funds because these trust funds are confined to "the amount received as surplus income over and above the amount necessary to pay debts secured by assignments". Thus, the first requirement for any monies to become impressed with the trust is that they be *received* by Cummings. And it is clear that Cummings never received this sum. However, even if Cummings had received this money it would have been paid to him as attorney-in-fact under Exhibit A, and then by the terms of Exhibit B it would first have to be applied on the debts secured by assignments. Until the debts secured by assignments are paid no monies received by Cummings can become trust funds under Exhibit B. Cummings himself had a debt in excess of \$50,000.00 secured by an assignment (Exhibit A), and this sum of \$34,166.20 was insufficient to pay off this secured obligation. Consequently, in no way could this money have become trust funds under Exhibit B.

It thus appears that the Circuit Court is attempting to

promulgate the novel doctrine that a trustee may incur obligations in the administration of his trust without regard to the ability of the trust estate to satisfy them, and if it is insufficient may sue his beneficiary or trust donor for recoupment of his losses. This is not the law in Idaho, nor in any other jurisdiction so far as petitioner is aware.

It Was Erroneous for the Court to Allow Recovery of \$10,000.00 Attorneys' Fees

Respondent, in his amended complaint, seeks a recovery of attorney's fees, basing such request upon the three promissory notes executed by McDonald. (Ex. 43; T. 44-49). The District Court granted an allowance to Cummings, individually, for attorney's fees of \$2,500.00 for legal services rendered Cummings, trustee, and \$7,500.00 as counsel fees based on the suit on the notes. The Circuit Court approved this award.

It may be flatly stated that no allowance may be made in any amount for legal services rendered Cummings, trustee. The claim filed by Cummings (T. 34-44) with the executor makes no mention of any sums due for such legal services, and under the Idaho statutes (I.C.A. 15-604) no action may be maintained against an estate until claim is duly presented. Also, respondent's amended complaint in this action does not seek any amounts for legal services rendered him as trustee, nor does it state any facts upon which an allowance for such services could be based. Consequently, the court committed serious error in granting this recovery to respondent.

It is also clear that respondent should not have been granted \$7,500.00, or any amount, as counsel fees based on the suit on the notes. It has always been the settled law of Idaho that attorneys' fees can in no event be recovered in an action unless the evidence establishes:

1. That the plaintiff has agreed to pay attorneys' fees either in a fixed amount or "reasonable fees"; and

2. The amount of the attorneys' fees which is reasonable. This rule of law was early adopted in Idaho, and has been consistently adhered to ever since; the District Court and the Circuit Court were not privileged to flagrantly disregard it.

Broadbent v. Brumback, 2 Ida. 366, 16 Pac. 555, (1888).

Warren v. Stoddard, 6 Ida. 692, 59 Pac. 540, (1899).

Porter v. Title Guaranty Co., 17 Ida. 364, 106 Pac. 299, (1909).

Lewis v. Sutton, 21 Ida. 541, 122 Pac. 411, (1912).

Eagle Rock Corp. v. Idamont Hotel Co., 59 Ida. 413, 85 Pac. (2d) 242, (1938).

Neither Cummings, nor anyone else, testified that he had agreed to pay any attorney's fee, either in a fixed or reasonable amount, and there is not a particle of evidence to that effect in the whole record. So the first requirement of the Idaho law has not been satisfied.

In addition, there is no evidence of any kind as to what amount of attorneys' fees would be reasonable, either for the suit on the notes or for the whole action. There is some testimony as to the amount of a *contingent* fee in the event of a "substantial recovery" (T. 374-379), and even this estimate goes far outside of the suit on the notes and includes many legal services rendered Cummings, individually, and Cummings, Trustee, and even covering a period of time when Cummings himself testified that he had no attorney (T. 165-6, 322). So it appears that the second requirement of the Idaho rule has not been fulfilled.

The Idaho law is clear and unquestioned that counsel fees cannot be allowed where the evidence does not meet the requirements, and the courts are not privileged to disregard these essential and fundamental prerequisites in their discretion. This does not involve a question of the adequacy of evidence. There is simply no evidence of any kind or character which satisfies or attempts to satisfy the Idaho rule.

CONCLUSION

It is respectfully submitted that the writ should be granted.

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